IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-5601

CARLOS RIVERA GOMEZ

Petitioner

v.

ASTOL CALERO TOLEDO

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals object of the instant action was reported (602 F. 2d 1010 (1979)) and is set forth in Appendix-4 of the Petition for a Writ of Certiorari filed by the petitioner in this case before this Honorable Court, as are all the pertinent portions of the record before the Court of Appeals.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the plaintiff in a civil rights action filed under 42 U.S.C. §1983 must allege bad faith on the part of the defendant in order to state a cause of action.

STATUTES INVOLVED

The Federal Statutes involved are: 42 U.S.C. sec. 1983, 28 U.S.C. sec. 1331 and sec. 1 of the Fourteenth Amendment to the Constitution of the United States of America. The pertinent provisions of those statutes are included in the petition.

STATEMENT OF THE CASE

This civil rights action for damages was filed at the United States District Court for the District of Puerto Rico by Carlos Rivera Gómez, formerly and still currently an agent with the Police Department of the Commonwealth of Puerto Rico, against Astol Calero Toledo, Superintendent of the same, seeking monetary compensation for supposed damages and injuries said to be caused by an alleged deprivation of some of his constitutional rights when he was temporarily discharged from the police force on July 14, 1976.

In April 1975, the petitioner, not acting within his official duties, and on account of knowledge admittedly obtained by unauthorizedly tapping private telephone conversations with other police agents made serious imputations regarding two other agents of the Bureau of Criminal Investigations of the Police Department, concerning what he considered as false evidence supposedly obtained and offered as evidence admissible in Law by those two fellow agents in a criminal case under their investigation.

An official inquiry was conducted as a result of the petitioner's imputations, but since it failed to substantiate them, it was recommended that petitioner not be returned to his former duties in the city of Ponce, that he be reprimanded in writing and that he be instructed to abstain from involving himself on his own whim in investigations officially assigned to other agents. Accordingly, the petitioner was transferred to the Police Headquarters in San Juan and later, as an instructor, to the Police Academy.

During the term of petitioner's duties as an instructor in the Police Academy, he testified for the defendant in a criminal case against one of the most sought after criminals in the island, declaring that the case had been "fabricated" by two investigative agents but, notwithstanding petitioner's testimony as to the alleged "fabrication," on March 27, 1976 the jury found the defendant guilty of first degree murder.

Then, as a result of plaintiff's having admitted in court that he had, on his own, tapped private telephone conversations of the agents allegedly involved in the above mentioned "fabrication", the judge presiding the criminal case ordered that the tapes be produced, and subsequently, criminal charges were brought against petitioner for violation of article 149 of the Puerto Rico Penal Code,[1/] pursuant to a report and recommendation of Assistant Prosecuting Attorney Jorge Roberto Feliciano, on May 20, 1976.

By letter of May 26, 1976, defendant Astol Calero Toledo, then Superintendent of the Police of the Commonwealth of Puerto Rico, acting in his official capacity, by virtue of authority vested on him under Law No. 77 of June 22, 1956, as amended, (25 L.P.R.A., secs. 221-221t), and regulations issued thereunder, and in due compliance with Sec. 14(E) of Act 26 of August 22, 1974 (25 L.P.R.A., sec. 1014(e), Cumulative Pocket Supplement of 1976), suspended petitioner temporarily from employment with the Police Department while he was being investigated on account of the aforementioned criminal charges.

1/ 33 LPRA 4190 (1978 Cumulative Pocket Supplement) which reads:

> "Every person who for his own or another's benefit, or to injure another, utilizes, negotiates, speculates, employs or otherwise makes use of a personal private message which has been unlawfully intercepted, violated, or recorded or who in any way induces or attempts to induce any agent, officer or employee of a telephone or telegraph company to disclose the contents of any private communication shall be punishable by imprisonment not exceeding three years or a fine not exceeding five thousand dollars or both in the discretion of the Court."

On July 14, 1976, petitioner was duly discharged from employment for violating Rules 3 and 26, Chapter 7, Sec. 1, Regulations of the Police of Puerto Rico by contesting unwarrantedly the honesty, integrity and competence of two member of the corps, making improper manifestations denigrating their dignity, and observing an injurious or disorderly conduct, thus harming the Police Department. Said discharge was in accordance with the applicable provisions of Commonwealth Law, which provides for appeal before the Investigation, Prosecution and Appeal Commission (CIPA) and petitioner was duly informed of his right to appeal from that order.

Petitioner appealed from his discharge by respondent Astol Calero Toledo's letter of July 14, 1976, before the Investigation, Prosecution and Appeals Commission, (CIPA), which after a hearing, and by ruling of December 1, 1976, revoked Astol Calero Toledo's administrative order discharging petitioner from employment and ordering his reinstatement to his former position, with salaries accrued.

Claiming that as a result of that shortlived[2/] discharge from his former employment he had suffered stress, anxiety, embarassment and impairment to his reputation, the petitioner, on July 14, 1977 sued the respondent for compensatory, punitive and exemplary damages before the United States District Court for the District of Puerto Rico.

The District Court dismissed the case on October 23, 1978, since from the complaint's deficient allegations, no set of probable facts were apparent which would entitle the plaintiff, here petitioner, to the relief claimed, because it had not even been alleged that the Superintendent of Police had acted in bad faith or that his conduct in

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2/ Three and a half months.

suspending and discharging the agent had been purposefully discriminatory or reckless.

Petitioner appealed before the United States Court of Appeals for the First Circuit, which on August 7, 1979 affirmed that decision, considering that since public officials acting in their official capacity enjoy qualified immunity from liability for damages if they have acted in good faith, the failure of plaintiff (here the petitioner) to allege bad faith, malice or even recklessness, plus the lack of any facts on which to make such an inference, the Superintendent (here the respondent) could not be held liable for damages, noting also as significant, the fact that plaintiff (here the petitioner) did not move to amend the complaint in the light of the applicable law after it was dismissed by the District Court.

ARGUMENT

Petitioner holds simply that in order for him to state a valid cause of action in a civil rights case against a public official filed under 42 U.S.C. sec. 1983, he did not even need to allege bad faith on the part of the Respondent, just because in many other circuits cases such pleading has not been required and because this Honorable Court has held the opposite.

Respondent holds that such contentions are not true and that in order to state a valid cause of action, petitioner's complaint should have at least included allegations of facts which, if proven, would have entitled him to the relief claimed, and also, that since respondent acted in good faith and in his official capacity in discharging petitioner from his job, he enjoied qualified immunity from liability for damages, concerning which, petitioner failed even to allege bad faith, malice or recklessness in the discharge of his duties or to evoke any facts on which such a tendencious inference could be made.

A certiorari should be denied, since only temerity or a less than diligent pursuit of petitioner's own interests left it available as a last recourse, which otherwise would have been unnecessary had the petitioner just moved to amend the complaint (dismissed for failure to allege enough) in the light of the applicable law when faced merely with the need to comply with a basic pleading requirement. Also because the decision of the Court of Appeals is not in conflict with the applicable decisions of this Honorable Court, is not in direct conflict, due to differences in the concurring facts with decisions of other courts of appeals on matters of federal law, it does not pose an irreconcilable conflict in the application of rules of law and only represents a correct exercise of independent judgment which, after all, might also stand on other grounds.

At the Court of Appeals, the defendant, (here respondent) contended that the requirements of Gaffney v. Silk, 488 F 2d 1243, (1 Cir. 1973), mandated the dismissal of the complaint, not merely because a qualified immunity had been invoked by defendant Astol Calero, within whose context the insufficiency of the allegations of the complaint could be determined, but also because the element of good faith in Astol Caleros' actions, though not questioned in the complaint, had definitely been considered by the District Court, since in the answer to the complaint the defendant stated, as an affirmative defense, that "at all times pertinent to the complaint the Superintendent of Police had acted in compliance with the applicable provisions of Law and in the good faith performance of his official duties as an executive officer of the Commonwealth of Puerto Rico", and since, as stated in the Decision and Order, the Complaint, even when read in the light most favorable to plaintiff, completely failed not only to "prove with particularity", but even to allege that this defendant had acted in bad faith or that his conduct had been purposefully discriminatory and reckless.

As it is therefore plainly evident, the District Court did not lightly presume, neither simply took for granted, the fact that respondent had acted in good faith. His qualified immunity was not born from an automatic assumption supposedly applied to a type of situation, but from the affirmed and uncontested essential fairness, and correctness of his performance while discharging his official duties.

Petitioner has alleged that a clear violation of statutory due process coupled with some allegations in the original complaint was sufficient to negate defendant's qualified immunity, but the truth is that there never was such a violation of due process (Allegedly consisting in the absence of a hearing prior to his discharge), since Act 20 of August 22, 1974 does not grant the celebration of such a hearing and neither do the Puerto Rico Police Regulations of 1968, while it could hardly be feasible to describe the Superintendents' official actions justly as "discriminatory persecution and wrong doing" since he limited himself to the most uniform enforcement of all Laws and Regulations applicable. So there could be no evidence of bad faith per se in such a normal discharge of respondent's official duties.

Finally, the fact that, upon appeal, the C.I.P.A. revoked the Superintendent of Police, serves as proof that the plaintiff was afforded, to a full extent, the benefits of a due process that unquestionably favored him.

An exemplary decision as such could only be construed, at most, to imply that the Superintendent had incurred in an administrative error for which the plaintiff has been already adequately compensated by being reinstated to his former position with salaries accrued. Therefore, absent the necessary original allegations to establish bad faith and to contradict later its affirmation, the complaint was indeed insufficient to assert and sustain a civil right claim for damages against the respondent.

In the instant case we understand that many of the allegations in the Complaint, as to Superintendent Calero, were highly conclusory and as such not sustained at all by law. (Please Refer to Paragraphs 10, 11, 12, 14 of the instant original Complaint, Appendix to Petition, pp. 9-10). Other allegations in the Complaint as to the Superintendent, were really only stating that the Superintendent acted in accordance with Act 26, 1974 which created the Law of the Police, and the Puerto Rico Police Regulation of 1968, which were the two statutes and Rules then in force which provided for the Police and the Superintendent to act and abide themselves by. (Please refer to paragraphs 1, 6, 12, 13 of the same Complaint, Appendix to Petition, pp. 8-10).

Nowhere in the complaint was defendant Calero charged specifically or even implicitly with having acted in bad faith or that his conduct was reckless or purposefully discriminatory, while on the contrary, he asserted not only that he had acted in good faith in the performance of his official duties but also explained positively how the applicable provisions of law had been dutifully complied with.

So, his qualified immunity, far from been automatically accorded, was granted taking in consideration the scope of his official duties as stated in the above cited Laws and Regulations. Petitioner failed totally even to allege that the Superintendent of Police had acted otherwise.

A review on writ of certiorari is a matter of sound judicial discretion which can neither be controlled nor fully measured even by the very Rules of this Honorable Court.

It is evident that the instant case lacks the special and important reasons and questions or issues of substance and wide impact to merit the exercise of such discretionary jurisdiction.

I- Implausibility of conflict between appellate courts decisions.

Petitioner states that the Decision of the Court of Appeals below created a conflict in the Decisions of the Circuit Courts of Appeals such as to merit the exercise of jurisdiction by this Honorable Court. That is not so.

The existence of a vital conflict between the decision as to which review is sought and that rendered by an another court of equal rank, is a well established ground for granting certiorari. However, in the instant case we shall see that the alleged conflict supposedly giving rise to the petition is not a true one, and that it does not in fact even exist as such.

There might be some differences in principle, but not a real conflict in the actual application of rules of law.

Petitioner brings himself to admit that besides the First Circuit, there is also support in the Fifth Circuit "for the position that plaintiffs have the burden of negating qualified immunity". Respectfully we deem that in all circuits, plaintiffs would gladly forward their cause by contradicting or negating any claim of qualified immunity once it has been put forward and fundamented by a defendant as it was in the instant case.

The fact that some circuits may have established different pleading requirements can be more properly considered as a correct exercise of independent judgment concerning only allegations, that can not be construed as placing the burden of proving anything on anyone but the most concerned part.

Nevertheless, in Cruz v. Beto, 603 F. 2d 1178 (5th. Cir. 1979), quoted by the Petitioner, the court went as far as to state that under some circumstances, the plaintiff had the burden of piercing qualified immunity by pleading and proving an abuse of authority or bad faith once such immunity had been established by the defendant by virtue of asserting that his questioned decisions were made in his official capacity, based on what he perceived to be a security need of the institution of which he was Director. In the instant case, the Superintendent

of Police did exactky the same, asserting that he had acted in his official capacity based on all laws, Rules and Regulations applicable, which he proceeded then to cite and explain). The court agreed that the plaintiffs had to carry that burden, since to deny the defendant qualified immunity protection unless he demostrates that his actions were above the benchwork of legal good faith, would make the concept of qualified immunity "a meaningless embellishment."

It must be born in mind that in the instant case, the respondent gladly took upon himself the burden of stating and explaining his good faith even when the plaintiff had failed not only to mention it with that many words, but even to imply any bad faith on his part concerning his discharge.

A plaintiff may have a cause of action under 42 USC Sec. 1983 and 28 USC 1343 only if he can sustain that his rights under the laws of Constitution of the United States have been violated by a person acting under color of law. In the present case, the only Constitutional right that plaintiff alleged was violated, was his statutory due process, which he alleged is granted to him under Act 26 (supra), but we respectfully believe that it should be clear by now that petitioner was dealt with, administratively, in accordance to the method the said Law provides for the imposition of disciplinary measures. (Please see: Curtiss v. Peerless Ins. Co., 299 F. Supp. 429 (D.C. Minn. 1969); Krum v. Sheppard, 255 F. Supp. 944 (D.C. Mich., 1966); United States v. Biloxi Municipal School District, 219 F. Supp. 691 (S.D. Miss. 1963); affd. 326 F 2d 237 (CA 5, 1964), cert. denied 397 US 929 (1964); Javits v. Stevens, 382 F. Supp. 135 (DCSDNY 1974). Also see: Heller v. Roberts, 386 F. 2d 382 (CA 2, 1967); Hopkins v. Wasson, 227 F. Supp. 279 (DCED Tenn. 1964 affd. 329 F. 2d 87, (CA 6, 1964) cert. denied 379 U.S. 854 (1964).

As to the statutory due process supposedly vitiated by Respondent Calero's act, paragraph 17 of the Complaint reads as follows:

> "17. That plaintiff's discharge without prior hearing was an act in violation of Law No. 26, of August 22, 1974 which law requires the celebration of administrative hearing prior to imposing disciplinary measure against members of the force and/or of his constitutional rights to a procedural due process of law and further violated plaintiff's right not to be arbitrarily discharged from public employment."

The respondent submitted that this particular allegation was not sustained anywhere or in anyway by law. The contents of Act 26, 1974 (supra) does not grant the celebration of an administrative hearing prior to the imposition of disciplinary measures against members of the Police Force. Act 26 (supra) at its pertinent part provides for the method to follow when imposing disciplinary measures and divides it in two, one for light shortcomings and one for serious shortcomings. (Please refer to Section 12, 13 and 14 of Act 26, supra). In no part of these sections of Act 26, supra, aforecited can it be found the administrative hearing that plaintiff affirms to exist, or his entitlement to it. There is only one reference to an opportunity for a defendant in those proceedings "to be heard" (not a formal hearing) and that is in Section 14, part (b) which reads as follows: "The Superintendent, after examining and analyzing the record, and after giving the defendant an opportunity to be heard, shall decide the case either by acquitting the defendant or by imposing the punishment he deems advisable as provided in subdivision (d) of this section." (Emphasis supplied).

We respectfully believe that in no way the aforementioned section could be misconstrued to signify that Law 26 (supra) requires "the celebration of an administrative hearing prior to imposing disciplinary measures against members of the force", and petitioner has not even alleged that he was denied the above cited opportunity.

Besides all the contentions stated above, we respectfully understand that petitioner was duly granted his statutory due process, a fact confirmed by the Ruling of the Investigation, Prosecution and Appeal Commission of December 1, 1976, reversing the Superintendent's decision of July 14, 1976 (discharging plaintiff from his job) "and ordering his reinstatement to his former position with salaries acfrued." (Please Refer To: Paragraph 16 of the Complaint in which plaintiff himself recognizes this situation).

Act No. 26 of August 22, 1974 did not require the celebration of an administrative hearing prior to the imposition of disciplinary measures upon members of the police force and thus the dismissal of plaintiff without a pre-termination hearing could not ever be construed as violative of his rights to due process, and much less that defendant Calero's participation in that decision could amount, even by a long strecht of imagination, to a demostration of bad faith, reckless or even purposefully discriminatory conduct.

The applicability of decisions in other cases invoked by petitioner does not bear closer scrutiny when it is considered that most of them did not deal with how the burden of proof falls when the immunity issue is raised.

In Skelman v. Board of Trustees of Bloomsbring State College, 550 F. 2d 53 (3d Cir. in banc, 1976), Cert. den. 429 US 979 (1976), cited by Petitioner as "the most directly in conflict with the decision below", the court, considering questions of burden of proof, held that the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact that official immunity should attach.

Is it not just that what respondent did in the instant case when he came forward in his Answer to the Complaint, stating as an affirmative defense and explaining how at all times he had acted in compliance with the applicable provision of Law and in the good faith performance of his official duties?

Is there any real conflict between the aforementioned case and the decision below just because here the trier of facts, after considering the pertinent dispositions of all laws and regulations invoked, was convinced that official immunity should attach? Of course not, and the same applies to other two of the cases cited by petitioner, like Safeguard Mutual Insurance Co. v. Miller, 472 F. 2d 732 (3d Cir. 1973) and Thompson v. Burke, 556 F. 2d 231, (3d Cir. 1977).

In Bivene v. Six Unknown Named Agents, 456 F 2d 1339 (2d Cir. 1972), also cited by petitioner as "probably the leading case on the good faith defense in 1983 actions among lower federal court decisions", the court merely held that public officials have no absolute immunity from suits for constitutional deprivations (something that no one ever claimed in the instant case) and that it is a defense to allege and prove good faith (an affirmative defense which was brought before the court by respondent in the instant case).

May we respectfully ask: Where is the real conflict? There is none, and of course if there were any it would not be irreconcilable at all. The same applies to Laverne v. Corning, 522 F. 2d 1144 (2d Cir. 1915), also cited by the petitioner.

In McCray v. Burrell, 516 F. 2d 357 (4th. Cir., in banc), 1975, cited by the petitioner, it was held that qualified immunity was a matter of defense. In the instant case, it was in effect brought up by the defendant, here respondent, as an

affirmative defense.

In Bryan v. Jones, 530 F 2d 1210 (5th. Cir., in banc) 1976 Cert. den. 429 U.S. 865 (1976), it was held that good faith is a defense (one that was alleged by respondent in the instant case) and that a plaintiff need not prove its absence to make out a prima facie case. In the instant case the petitioner failed first not only to prove, but even to allege such absence and later to contradict the presence of good faith once it had been invoked, claimed and explained by respondent.

Is there any similarity at all? Certainly petitioner must concede that there is a difference between not needing to prove anything beforehand, and failing later to contradict something that has been already claimed and explained to the subsequently evident satisfaction of a court.

In Rainer v. Short, 573 F. 2d 621 (5th Cir. 1978) 99 S. C. 1425 (1979), the Court of Appeals approved a jury instruction placing the burden of proving the good faith defense on the defendants.

Respectfully we deem that there is no real conflict between a decision that merely requires plaintiffs to allege something, and another one that places on defendants the burden of contradicting later such allegation by proving that the contrary was true. In fact it could be said that both complement each other.

In Glasson v. City of Louisville, 518 F. 2d 899, 907-910 (6th Cir. 1975) Cert. den. 423 U.S. 930 (1975) and in Jones v. Penegan, 459 F. 2d 31 (6th. Cir. 1972), cited by the petitioner, the courts characterized qualified immunity as an affirmative defense, which was just and exactly the way respondent qualified it in his answer to the complaint.

In Tritsis v. Backer, 501 F 2d 1021 (7th Cir. 1974), Brubaker v. King, 505 F. 2d 534 (7th Cir. 1974). Boscarino v. Nelson, 518 F. 2d 879 (7th. Cir. 1975), also cited by the petitioner, qualified immunity is treated as a defense, something that poses no real conflict with the decision below in the instant case, which besides treating the aforementioned immunity likewise, merely sets the allegation of absence of an element to which it is conditioned (good faith) as a pleading requirement.

In Landrum v. Moats, 576, F. 2d 1320 (9th. Cir. 1978), Cert. den. 439 U.S. 912, cited by the petitioner, it was held that like in case of any other affirmative defense, the burden of proving good faith (as an element of the defense, to the jury's satisfaction) was on the defendant. In the instant case, such burden was spontaneously born also by the defendant and if as stated there, the validity of the defense is "ordinarily" a question for the jury, in the instant case, since the affirmative defense rested on the strict compliance with all applicable rules and regulations, we respectfuly deem that such question was really for the judge.

In Gilker v. Baker, 576 F. 2d 245 (9th. Cir. 1978), it was held that the plaintiff need only make out a prima facie case of a constitutional violation, and then the burden shifts to the defendant. In the instant case, good faith was brought forward by respondent as an affirmative defense, even when petitioner had not really made out a prima facie case of a constitutional violation.

The actions of the Superintendent of Police herein involved were in strict compliance with the applicable provisions of law, within the bounds of his official authority, and far from being a "blatant disregard of his agency's procedural requirements, they constituted a valid and lawful discharge of his official duties which, particularly after a speedy and adequate administrative remedy rendered plaintiff whole, could not and should not be utilized as the basis for a civil rights claim.

In Donovan v. Reinhold, 433 F 2d 738 (10th Cir. 1970), it was held only that good faith would be a defense, something that we do not dispute since that does not preclude the fact that it could also be a pleading requirement.

In Martin v. Duffe, 463 F 2d 464 (10th Cir. 1972), it was held that good faith most be put forward as a defense, something that was done in the instant case.

In Dellums v. Powell, 566 (F. 2d 167 (D.C. Cir. 1977), Cert. den. 436 U. S. 915 (1978) reh. den. 439 U. S. 886 (1978), Apton v. Wilson, 500 F 2d 33 (D.C. Cir. 1974) and Zweibon v. Mitchell, 516 F. 2d 594 (1975), Cert. den. 425 US 944 (1976), it was also held that the burden of proving qualified immunity is on the defendants.

None of the above cases cited by petitioner pose an unsolvable conflict with the instant decision below due to the particular factors concurring here, where not only the petitioner failed to allege anything which would entitle him to the relief claimed, but also, significantly, where the respondent successfully put forward an affirmative defense of good faith based on strict compliance with all applicable laws, rules and regulations which explained and justified his behavior by themselves.

Besides, since the decision below could have been based on such an alternative ground, the fact that such decision might conflict with that of another appellate court on an issue does not constitute an adequate reason for the grant of certiorari.

As this Honorable Court stated in The Monaco v. Carbon Black Inc., 359 US 180 (at 184): "While this court decides questions of public importance, it decides them in the context of meaningful litigation'. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial, Resolution here of the .../Issue in conflict among the circuits/ can await a day when the issue is posed less abstractly."

II- Implausibility of Conflict with Decisions of the Supreme Court.

This happens not to be such a case where a decision of the Court of Appeals clearly fails to apply Supreme Court decisions neither deliberately or because of error or oversight.

There is not any direct conflict between the decision of which review is being sought by petitioner and any decision of this Honorable Court.

In Monroe v. Pape, 365 U.S. 167 (1961), cited by petitioner, it was held only that a civil right plaintiff did not have to allege a willful violation of constitutional rights or a specific intent to violate constitutional rights.

The instant case was dismissed mainly because from the complaint's deficient allegations, no set of probable facts were apparent which would entitle plaintiff to the relief claimed, and not because plaintiff might have merely failed to allege a specific intent to violate or a wilfull violation of his rights. Here, petitioner not only failed to allege bad faith and to prove with particularity any wilfull violation of his rights, but, more significantly, he failed even to state with particularity any prima fascie violation at all to his constitutional rights be it wilfull or not, while at the same time, respondent spontaneously raised the issue of immunity putting it forward as a defense.

It should be noted here, that dismissal of plaintiff was effected only after completion of an administrative investigation, in which plaintiff had the opportunity to be heard, and as a result of the recommendations made to the Superintendent of Police pursuant to said investigation.

Those who conducted the aforementioned administrative investigation and/or formulated the pertinent recommendations thereof are not parties to the present action (although they should be, since they are indispensable, pursuant to the

Federal Rules of Civil Procedure) but nevertheless, the reinstatement of plaintiff to his former position with back pay accrued, effected by the Investigation, Prosecution and Appeals Commission (C.I.P.A.) upon his appeal in accordance with the applicable provisions of law, as admitted in the complaint itself, far from constituting evidence of bad faith or purposeful discrimination on the part or the Superintendent, established beyond doubt that plaintiff was afforded due process of law and that his rights to "liberty" and "property" had been adequately protected.

In Pierson v. Ray, 386 U.S. 547 (1967), this Honorable Court held that defendants would have available to them the defense of good faith, which was put forward by respondent in the instant case, and while it noted that a complaint should not be dismissed for failure to state that the officers had a specific intent to deprive a person of a federal right, it can not be presumed that the instant case, was dismissed only on those grounds, since the court also had the benefit of considering the reasonableness and validity of the affirmative defenses put forward by the respondent.

Respectfully we deem that it can not be said that the court below held that the plaintiff must negate in his complaint the existence of the defendants' qualified immunity when it was just held there that he had only to allege that the defendant had acted in bad faith, leaving upon the defendant the burden of proving that in effect, he had access to a qualified immunity since he had acted only in good faith within the scope of his official duties.

In Scheuer v. Rhodes, 416 U.S. 232 (1974), this Honorable Court held that there is no automatic assumption that defendant public officials have acted in good faith, and that such good faith can not be taken for granted.

The decision of the Court of Appeals below does not contradict at all this language of Scheuer v. Rhodes, since at the District Court, whose decision was affirmed by it, such "assumption" far from being automatically applied, and since such good faith, far from being taken for granted, were given their due credit only after the court could ponder on the validity of the affirmative defenses put forward by the respondent.

In Wood v. Strickland, 420 U.S. 308 (1975), this Honorable Court held that where the applicable constitutional principles were settled, a plaintiff need not show malice on the part of a defendant, in order to prove a claim. This poses no conflict with the decisions in the instant case, where the applicable constitutional principles were not settled at all, and where it was obviously deemed that the complaint was not specific and factual as to the claims made, failing to comply with a basic pleading requirement: stating that the pleader was entitled to relief, not by actually showing malice but by at least merely alleging that the respondent had acted in bad faith.

Petitioner cites Butz v. Economou, 438 US 478 (1978), but that case, besides contributing a deep historical analysis of the immunity defense, does little if anything at all to bolster his contentions, while on the contrary, as we see in Procunier v. Navarette, 434 U.S. 555 (1978), this Honorable Court conclusively affirmed the granting of a summary judgment in a case where the defendants had raised the defense by motions supported by affidavits. This has a direct hearing on the instant case, where the defendant raised the same defense in his answer to the complaint (Nov. 10, 1967) and on his motion to dismiss (July 3, 1978), supported nonetheless by direct citations of the laws, rules and regulations applicable which stood by themselves.

SUMMARY

The decision of the Court of Appeals below is not in any real or direct conflict with pertinent decisions rendered by other Courts of Appeals, which in most cases actually complement it as well each other, some by emphasizing the importance of compliance with a basic pleading requirement, some by defining the contours or scope of qualified immunity for public officials in cases such as the instant one, and others by recognizing distinctions as to the burden of proof, depending on the amount of discretion exercised by the defendant. It is neither in conflict with any decision rendered by this Honorable Court, who as a matter of fact, has not yet squarely declared how the burden of proof falls when the immunity issue is raised, since it was precisely based on such decisions as those in Scheuer v. Rhodes, 416 U.S. 232 (1974), Pierson v. Ray, 388 US 547 (1967) and Wood v. Strickland, 420 US 308 (1975).

Besides lacking the special and important questions of substance to merit the exercise of its discretionary jurisdiction, certiorari should be denied by this Honorable Court since it was deliberately left by the petitioner as a last recourse which otherwise would have been unnecessary had him innitially complied with pleading requirements of which full knowledge can be presumed on his part, or had him simply moved to amend the complaint (dismissed just for failure to allege enough once he had been given notice of the fatal consequences of such incompliancy, and also, because after the respondent put forward his affirmative defenses, the decision of the court below might have been issued as well in view of self evident assertions such as that his decision was made as Superintendent of Police, consonant with what was provided in all applicable laws, rules and regulations, besides considering what he, acting upon recommendation arising from an official inquiry had perceived then to be more convenient to the spirit and reputation of the Police Department which had been harmed by the irregular and unorthodox activities of petitioner

(who after tapping private telephone conversations had made improper manifestations denigrating the dignity, honesty, integrity and competence of two fellow officers, observing an injurious or disorderly conduct, thus harming the Police Department).

In the absence of any clear violation of statutory due process and lacking the necessary allegations of factual circumstances to support the equally absent imputations of bad faith, the allegations of the complaint could only be deemed as insufficient to assert a civil rights claim against the Superintendent of Police for, at best, all that could be established thereof, through a complaint that chose to ignore a basic pleading requirement, is that the Superintendent had incurred in an administrative error while discharging the plaintiff, a situation to which, shortly after, adequate remedy was granted when petitioner was reinstated to his former position, with salaries accrued, by the Investigation, Prosecution and Appeals Commission of the Police Department.

The decision of the Court of Appeals did not affirm a decision where an assumption of qualified immunity had been automatically applied, thought it might seem so, since, thought it went unsaid, the concurrence of such a sine qua non factor as good faith was given its due credit only after the District Court could ponder on the validity of the affirmative defenses put forward by the respondent, which rested simply on his full compliance with the applicable dispositions of law.

Thus, the Court of Appeals did not err, when it concluded that the failure of plaintiff to allege bad faith plus the lack of any facts on which to make such an inference was fatal, mainly in view of the fact that respondent had raised effectively the issue of qualified immunity.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

San Juan, Puerto Rico, this 4th day of December, 1979

VICTOR A. COLON CRUZ
Solicitor General

FEDERICO CEPEDA ALZAMORA
Assistant Solicitor General